Tan Ewe Chong & Ors v Pribudi Sdn Bhd & Ors

HIGH COURT (PULAU PINANG) — CIVIL SUIT NO 22-168 OF 1994
JEFFREY TAN J
30 JUNE 1997

Civil Procedure *— Judgment — Default judgment — Application to set aside — Plaintiff obtained default judgment ordering defendant to transfer title to land to plaintiff — Whether plaintiff's application was made under correct rule — Plaintiff entered judgment without court's leave — Whether judgment irregular — Whether judgment should be set aside ex debito justitiae — Delay in applying to set aside judgment and in conducting defence — Whether delay militates against the right ex debito justitiae — Whether defence on merit shown — Rules of the High Court 1980 O 19 rr 5, 7*

The plaintiffs entered a judgment in default of defence against the defendant on 19 May 1995. According to the terms of the default judgment, the defendant was ordered to transfer title to certain land to the plaintiff, failing which the senior assistant registrar would execute the instrument of transfer. On 14 September 1995, the instrument of transfer was executed by the senior assistant registrar. The defendant applied to set aside the default judgment on 17 November 1995 on the grounds that the default judgment was irregular as it was entered pursuant to O 19 r 5 of the Rules of the High Court 1980 ('the RHC') when it should be O 19 r 7, and was not, accordingly, in strict compliance with the RHC. The defendant and its solicitors were absent when the application to set aside was called up for hearing on 27 November 1995 and 25 March 1996 and there was no application for a further hearing date until 21 November 1996.

Held, dismissing the application:

Order 19 r 5 of the RHC and the operative phrase 'possession of immovable property' is only applicable if the claim is for possession of immovable property and not if the claim involves immovable property. 'Possession' in the context of r 5 carries the ordinary and popular meaning, in the sense of physical possession, and not a technical or special meaning. In the instant case, there was no claim for physical possession. Therefore, r 5, regulating a claim on the recovery of possession of immovable property, was not the applicable rule. The applicable rule was r 7 that required the plaintiffs, after the expiration of the period fixed by the rules for service of the defence, to apply to the court by summons or motion for judgment. That was not done in the instant case. Therefore, since the default judgment was entered without the court's leave, it was irregular which rendered the judgment a nullity, and thus it should be set aside ex debito justitiae.

However, in this case, there was delay on the part of the defendant. Delay militates against the right ex debito justitiae. It is a cardinal principle of law that when a litigant seeks the intervention of the court in a matter that affects his right, he must do so timeously. In

A the instant case, delay was ubiquitous in the defendant's conduct of its defence. The measures taken by the plaintiffs to secure the execution of the memorandum of transfer and the order for the cancellation of the titles as well as the issuance of replacement titles were not accomplished *sub rosa*. Yet, the defendant stood idly by as the default judgment was entered, as the memorandum of transfer B was executed and as the order was granted to cancel and issue new titles. That was indolent conduct, and it forfeited the right ex debito justitiae to set aside the default judgment. It would be unjust if the default judgment was set aside ex debito justitiae, as the defendant facilitated by sheer indolence the creation of vested interests which ought C not now suffer a detriment by the setting aside ex debito justitiae of a default judgment brought about entirely by the defendant. It was condign only that the setting aside ex debito justitiae was refused.

Moreover, there was no defence on the merits. There was no statement of defence or a statement in the affidavit supporting the D application for setting aside the judgment in default that resembled, even remotely, a defence, let alone a prima facie defence. The proposed defence and counterclaim were also without merit. Therefore, the application to set aside the default judgment was dismissed (see pp 114A–F, 116D–I, 117A–B, 118H–I and 119A–B); *Sykt Joo Seng & Anor v Habib Bank Ltd* [1986] 2 MLJ 129, *Khor Cheng Wah v Sungai* E *Way Leasing Sdn Bhd* [1996] 1 MLJ 223 and *Tuan Hj Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30 followed.

[Bahasa Malaysia summary

Plaintif-plaintif memasukkan penghakiman ingkar pembelaan terhadap F defendan pada 19 Mei 1995. Menurut terma penghakiman keingkaran, defendan diperintahkan memindah hakmilik tanah tertentu kepada plaintif, dan kegagalan berbuat demikian akan menyebabkan penolong kanan pendaftar melaksanakan instrumen pindahmilik. Pada 14 September 1995, instrumen pindahmilik dilaksanakan oleh penolong kanan pendaftar. Defendan memohon G untuk mengetepikan penghakiman keingkaran pada 17 November 1995 atas alasan bahawa penghakiman keingkaran adalah luar aturan kerana ia dimasukkan menurut A 19 k 5 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') apabila ia sepatutnya dilakukan menurut A 19 k 7, dan dengan itu, tidak mematuhi KMT secara ketat. Defendan H dan peguamcaranya tidak hadir ketika permohonan untuk mengetepikan dipanggil untuk pembicaraan pada 27 November 1995 dan 25 Mac 1996 dan tiada permohonan untuk tarikh pembicaraan lanjut sehingga 21 November 1996.

Diputuskan, menolak permohonan: I

Aturan 19 k 5 KMT dan ungkapan 'milikan harta tak alih' hanya terpakai sekiranya tuntutan adalah untuk milikan harta tak alih dan bukan sekiranya tuntutan melibatkan harta tak alih. 'Milikan' dalam konteks k 5 membawa maksud yang biasa dan popular, dalam ertikata

milikan fizikal, dan bukannya maksud teknikal atau maksud khas. Dalam kes ini, tiada tuntutan untuk milikan fizikal. Maka, k 5, yang mengawal tuntutan mendapat balik milikan harta tak alih, bukanlah kaedah yang terpakai. Kaedah yang terpakai adalah k 7 yang menghendaki plaintif-plaintif memohon kepada mahkamah melalui saman atau usul untuk penghakiman selepas tamatnya tempoh yang ditetapkan oleh kaedah-kaedah untuk penyampaian pembelaan. Ini tidak dilakukan dalam kes ini. Maka, oleh kerana penghakiman keingkaran dimasukkan tanpa kebenaran mahkamah, ia adalah luar aturan yang menjadikan penghakiman suatu pembatalan, dan justeru itu ia harus diketepikan ex debito justitiae.

Namun demikian, dalam kes ini, terdapat kelewatan pada pihak defendan. Kelewatan menghalang hak ex debito justitiae. Adalah merupakan satu prinsip utama undang-undang bahawa apabila seorang litigan inginkan campur tangan mahkamah dalam suatu perkara yang menjejaskan haknya, dia mesti berbuat demikian tanpa kelewatan. Dalam kes ini, kelewatan sentiasa ada dalam perilaku pembelaan defendan. Langkah-langkah yang diambil oleh plaintif-plaintif untuk menjamin pelaksanaan memorandum pindahmilik dan perintah pembatalan hakmilik serta keluaran hakmilik ganti tidak diselesaikan *sub rosa*. Namun begitu, defendan membiarkan sahaja sewaktu penghakiman ingkar dimasukkan, ketika memorandum pindahmilik dilaksanakan dan ketika perintah diberikan untuk membatalkan dan mengeluarkan hakmilik. Ini adalah sikap berat tulang, dan ia melucut hak ex debito justitiae untuk mengetepikan penghakiman ingkar. Adalah tidak adil sekiranya penghakiman ingkar diketepikan ex debito justitiae, kerana defendan melalui sikap berat tulang memudahkan perwujudan kepentingan terletakhak yang kini tidak sepatutnya terjejas oleh pengetepian penghakiman ingkar ex debito justitiae yang pada keseluruhannya disebabkan oleh defendan. Adalah berat dan setimpal bahawa pengetepian ex debito justitiae ditolak.

Tambahan pula, tiada pembelaan atas merit. Tiada pernyataan pembelaan atau pernyataan dalam afidavit yang menyokong permohonan untuk mengetepikan penghakiman keingkaran yang sedikit pun serupa dengan suatu pembelaan, apatah lagi pembelaan prima facie. Pembelaan dan tuntutan balas yang dicadangkan juga adalah tanpa merit. Maka, permohonan untuk mengetepikan penghakiman keingkaran ditolak (lihat ms 114A–F, 116D–I, 117A–B, 118H–I dan 119A–B); *Sykt Joo Seng & Anor v Habib Bank Ltd* [1986] 2 MLJ 129, *Khor Cheng Wah v Sungai Way Leasing Sdn Bhd* [1996] 1 MLJ 223 dan *Tuan Hj Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30 diikut.]

Notes

For cases on an application to set aside judgment in default, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1853–1861.

Cases referred to

A *Alpine Bulk Transport Co Inc v Saudi Eagle Shipping Co Inc; the Saudi Eagle* [1986] 2 Lloyd's Rep 221 (refd)
Arab Malaysian Credit Bhd v Prinwell (M) Sdn Bhd [1993] 2 AMR 1909 (refd)
BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1978) 52 AJLR 20 (refd)
B *Ban Huat Seng Co Ltd v Lee Poh Soo* [1967] 1 MLJ 145 (refd)
Bank Bumiputra Malaysia Bhd v Majlis Amanah Ra'ayat [1979] 1 MLJ 23 (refd)
Cheow Chew Khoon & Teoh Chew Khoon (t/a Cathay Hotel) v Abdul Johari bin Abdul Rahman [1995] 1 AMR 759 (refd)
C *Chong Kueng Ying & Ors v Lovis Lavagna* [1971] 2 MLJ 225 (refd)
Craig v Kanseen [1943] 1 All ER 108 (refd)
Development & Commercial Bank Bhd v Aspatra Corp Sdn Bhd & Anor and another appeal [1995] 3 MLJ 472 (refd)
Evans v Bartlam [1937] AC 473 (refd)
D *Fira Development Sdn Bhd v Goldwin Sdn Bhd* [1989] 1 MLJ 40 (refd)
Hong Leong Finance Ltd v Tay Keow Neo & Anor [1992] 1 SLR 205 (refd)
Khor Cheng Wah v Sungai Way Leasing Sdn Bhd [1996] 1 MLJ 223 (folld)
E *L Oppenheim & Co v Mahomed (or Mohomed) Heneef* [1922] 1 AC 482 (refd)
PT Pelajaran Nasional Indonesia v Joo Seang & Co Ltd [1958] MLJ 113 (refd)
Reigate v Union Manufacturing Co (Ramsbottom) [1918] 1 KB 592 (refd)
Sykt Joo Seng & Anor v Habib Bank Ltd [1986] 2 MLJ 129 (folld)
F *Tan Tin Swee @ Tan Than Chooi v Kangar Properties Sdn Bhd* [1990] 2 CLJ 457 (refd)
Tuan Hj Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd [1996] 1 MLJ 30 (folld)
Udos ak Riging, Re, ex p Seabanc Kredit Sdn Bhd [1994] 3 MLJ 383 (refd)
G *United Malayan Banking Corp Bhd v Mideast Development Sdn Bhd & Ors* [1991] 1 MLJ 55 (refd)
United Oriental Assurance Sdn Bhd v Ng King See [1987] 2 MLJ 264 (refd)
United Overseas Bank Ltd v Chung Khiaw Bank Ltd [1968] 2 MLJ 85 (refd)
H *Windsor v Chalcraft* [1938] 2 All ER 751 (refd)

Legislation referred to

Interpretation Acts 1948 and 1967 s 3
Rules of the High Court 1980 O 19 rr 5, 7, 9, O 42 r 12, O 83

I

Teja Singh (*Teja Singh & Co*) for the plaintiffs.
Yeoh Cho Kheong (*Othman Hashim & Co*) for the defendants.

Cur Adv Vult A

Jeffrey Tan J: This is the first defendant's application (encl 22) to set aside the judgment in default of defence entered by the plaintiffs against the first defendant on 19 May 1995.

A judgment entered in default is not a judgment decided on merits B (*L Oppenheim & Co v Mahomed (or Mohomed) Heneef* [1922] 1 AC 482) and is liable, as it does not finally dispose of the rights of the parties, to be set aside (*Re Udos ak Riging, ex p Seabanc Kredit Sdn Bhd* [1994] 3 MLJ 383).

As Lord Atkin, in *Evans v Bartlam* [1937] AC 473 at p 480, observed: C

> The principle obviously is that unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive powers where that has been obtained by a failure to follow any of the rules of procedure.

Indeed, O 19 r 9 of the Rules of the High Court 1980 ('the RHC') D provides that 'the Court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this Order', and the court's powers to set aside an irregular judgment is exercisable at the instance of any party injuriously affected by it (*Windsor v Chalcraft* [1938] 2 All ER 751) or at the instance of strangers to the action aggrieved by the judgment in the action (*Chong Kueng Ying & Ors v Lovis Lavagna* [1971] 2 MLJ E 225).

As a general rule, where a judgment is irregular, it will be cast aside as a matter of right (ex debito justitiae): see *Janab's Key to Civil Procedure in Malaysia and Singapore* (2nd Ed) at p 314. Where the judgment is regular, 'it is axiomatic ... that there must be an affidavit of merits, that is, F an affidavit stating facts showing a defence on the merits': *Bank Bumiputra Malaysia Bhd v Majlis Amanah Ra'ayat* [1979] 1 MLJ 23, per Raja Azlan Shah J (as he then was).

Mr Yeoh Cho Kheong, learned counsel for the defendants, submitted that the default judgment was irregular, as it was entered pursuant to O 19 G r 5 when it should be O 19 r 7, and was not, accordingly, in strict compliance with the rules.

However, Mr Teja Singh, learned counsel for the plaintiffs, contended that O 19 r 5 was the applicable rule and that the judgment was regular.

Order 19 rr 5 and 7 read as follows: H

> Default of defence: Claim for possession of immovable property
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> 5(1) Where the plaintiff's claim against a defendant is for possession of immovable property only, then, if that defendant fails to serve a defence on the plaintiff, the plaintiff may, after the expiration of the period fixed by or under these rules for service of the defence, and on producing a certificate by his solicitor, or (if he sues in person) an I affidavit, stating that he is not claiming any relief in the action of the nature specified in Order 83 rule 1, enter judgment for possession of the immovable property as against that defendant and for costs, and proceed with the action against the other defendants, if any.

A 5(2) Where there is more than one defendant, judgment entered under this rule shall not be enforced against any defendant unless and until judgment for possession of the immovable property has been entered against all the defendants.

Default of defence: Other claims

B 7(1) Where the plaintiff makes against a defendant or defendants a claim not mentioned in rules 2 to 5, then, if that defendant or all of the defendants (where there is more than one) fails to serve a defence on the plaintiff, the plaintiff may, after the expiration of the period fixed by or under these rules for service of the defence, apply to the Court for judgment, and on the hearing of the application the Court shall C give such judgment as the plaintiff appears entitled to on his statement of claim.

7(2) ...

7(3) An application under paragraph (1) must be made by summons or motion.

D The facts asserted in the statement of claim may be summarized as follows. By an agreement dated 17 November 1987, the plaintiffs (the registered proprietors) agreed to sell and the first defendant agreed to buy lands known as Lots 729, 345 and 346, Mukim 7, Seberang Perai Selatan, ('the lands'). That agreement of 17 November 1987 provided that the sale and purchase price of RM884,625.18 shall be paid by a deposit of E RM250,000 payable upon the execution of the agreement, and, a further payment of RM220,000 payable within three months from 17 January 1987 (the agreement did not provide for the payment of the balance). Clause 5 of the agreement set out the conditions precedent for the sale. Those conditions were fulfilled and the lands were transferred to the first F defendant. The total purchase price should have been paid to the plaintiffs upon the transfer of the said lands to the first defendant. The second, third and fourth defendants guaranteed the first defendant's payment of the balance sum of RM634,625.18. The first defendant failed to pay the balance sum. On 30 April 1993, the plaintiffs demanded the payment of the balance sum. The defendants failed to comply with the plaintiffs' G demand. The first defendant subdivided the said lands into 149 (sic) buildings lots — [HS (M) 607–758]. On 21 February 1994, the plaintiffs lodged a private caveat against any dealings of the subdivided lots.

The default judgment, and it should mirror the relief sought, reads as follows:

H Tiada pembelaan telah dimasukkan oleh defendan No (1) dalam kes ini. Adalah pada hari ini dihakimkan bahawa defendan No (1) memindah milik kesemua lot-lot yang telah dipecah bahagian iaitu HS (M) 721–728, HS (M) 662–720 dan HS (M) 607–661 Mk 7, SPS, Pulau Pinang kepada plaintif-plaintif dan sekiranya berlaku kegagalan di pihak defendan No (1) untuk membuat pindah milik tersebut, Penolong Kanan Pendaftar I Mahkamah Tinggi Pulau Pinang diberi kuasa untuk melakukan pindah milik tersebut bagi pihak defendan No (1).

That that default judgment involved immovable property, and 'immovable property means land and any interest in, right over or benefit arising or to

arise out of land' (see s 3 of the Interpretation Acts 1948 and 1967), is beyond question. However, r 5 and the operative phrase 'possession of immovable property', is only applicable if the claim is for possession of immovable property and not if the claim involves immovable property.

'Possession' is one of the most enigmatic words in the English language (see *Leow Nghee Lim v R* [1956] MLJ 28). However, 'possession' in the context of r 5 carries the ordinary and popular meaning, in the sense of physical possession, and not a technical or special meaning. The special mention of O 83 — the procedure on a claim by a chargee or chargor or any person having the right to foreclose or redeem any charge, for, inter alia, 'the delivery of possession' — expounds entirely that ordinary and popular meaning.

In the instant case, there was no claim for physical possession. The first defendant was ordered, according to the terms of the default judgment, to transfer title of the subdivided lots to the plaintiffs, failing which the learned SAR would execute the instrument of transfer. Therefore r 5, regulating a claim on the recovery of possession of immovable property, was not the applicable rule.

The applicable rule was r 7 that required the plaintiffs, after the expiration of the period fixed by the rules for service of the defence — since the claim as reflected by the default judgment was of a description not mentioned in rr 2 to 5 — to apply to the court by summons or motion for judgment (in *Sykt Joo Seng & Anor v Habib Bank Ltd* [1986] 2 MLJ 129, the Supreme Court held that O 19 r 7 requires a plaintiff to apply to the court or a judge for leave to enter judgment). That was not done in the instant case. But as is often the case, the controversy is whether the non-compliance was a mere irregularity or a defect which made the default judgment a nullity. Where is the line that separates an irregularity from a defect which makes the order a nullity?

His Lordship, Edgar Joseph Jr FCJ, in *Tuan Hj Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30, observed as follows (at pp 37–38):

> The case of *Marsh v Marsh* [1945] AC 271 (PC) at p 284 shows that there is no decisive test for ascertaining what irregularities will result in a judgment being rendered void as distinct from voidable, though it was there suggested by Lord Goddard when speaking for the Board that one test which may applied is whether the irregularity has caused a failure of natural justice. That is how his Lordship put it (at p 284):
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> > 'A considerable number of cases were cited to their Lordships on the question as to what irregularities will render a judgment or order void or only voidable. *Anlaby v Praetorius* (1888) 20 QBD 764 and *Smurthwaite v Hannay* [1894] AC 494 are leading examples of the former, while *Fry v Moore* (1889) 23 QBD 395 may be said to illustrate the latter. The practical difference between the two is that if the order is void, the party whom it purports to affect can ignore it, and he who has obtained it will proceed thereon at his peril, while if it be voidable, only the party affected must get it set aside. No court has ever attempted to lay down a decisive test for distinguishing between the two classes of

A irregularities, nor will their Lordships attempt to do so here, beyond saying that one test that may be applied is to inquire whether the irregularity has caused a failure of natural justice.'

However, in *Wiseman v Wiseman* [1953] 2 WLR 499, Denning LJ (as he then was) criticized the above dictum of Lord Goddard, in our view, with considerable justification, when he said (at p 509):

B 'It has been said that one test of the distinction between void and voidable is to inquire whether the transaction has caused a failure of natural justice: see *Marsh v Marsh* [1945] AC 271. But I confess that I cannot follow this. If the defect is such as to make the transaction absolutely void, then void it is, no matter whether it causes a failure of
C natural justice or not. But if the effect of the defect is only to make the transaction voidable, then natural justice may well be taken into account by the court in deciding whether it will in its discretion set the transaction aside or not, but it does not make the transaction automatically void.'

Having said that, there are some general observations which we should like to make regarding judgments which have not been regularly obtained. It has
D been said that a judgment would not be regularly obtained if it has been entered contrary to the rules, as for example ... .

Lord Greene MR in *Craig v Kanseen* [1943] 1 All ER 108, pronounced that an order 'which can be described as a nullity is something which the person affected by it is entitled ex debito justitiae to have set aside'. In a
E similar vein, it was held by the Singapore Court of Appeal in *United Overseas Bank Ltd v Chung Khiaw Bank Ltd* [1968] 2 MLJ 85, that an order obtained on a summons not served on an essential party 'is a nullity and the appellants who are affected by it are entitled ex debito justitiae to set it aside'.

F Be that as it is, the following were held as irregularities that rendered the judgment a nullity:

(a) failure to serve the summons, apart from proper ex parte proceedings upon which the order was based (*Craig v Kanseen*; *United Overseas Bank Ltd v Chung Khiaw Bank Ltd*);

G (b) service not provided by law (see *PT Pelajaran Nasional Indonesia v Joo Seang & Co Ltd* [1958] MLJ 113, when Rigby J held, on the compliance of the method or form or procedure for effecting service as provided by law, that a court would set aside a judgment obtained by default where the requirements had not been complied with, and that all proceedings thereafter, including the judgment, was a nullity;

H (c) failure to mention the mode of service in the application for substituted service (see *Arab Malaysian Credit Bhd v Prinwell (M) Sdn Bhd* [1993] 2 AMR 1909, where Shaik Daud J (as he then was) opined, 'where proceedings are taken in the absence of one party, it is most important that there should be strict compliance with the rules';

I (d) a default judgment different from the prayers in the statement of claim such that the plaintiff is getting more than what he prayed (*Cheow Chew Khoon & Teoh Chew Khoon (t/a Cathay Hotel) v Abdul Johari bin Abdul Rahman* [1995] 1 AMR 759);

(e) a default judgment obtained prematurely (see *Tan Tin Swee @ Tan Than Chooi v Kangar Properties Sdn Bhd* [1990] 2 CLJ 457); A

(f) a default judgment for a larger sum than that allowed by O 42 r 12 of the RHC, with regard to the interest from the date of judgment (*Development & Commercial Bank Bhd v Aspatra Corp Sdn Bhd & Anor and another appeal* [1995] 3 MLJ 472; *United Malayan Banking Corp Bhd v Mideast Development Sdn Bhd & Ors* [1991] 1 MLJ 55) (contrast with *Khor Cheng Wah v Sungai Way Leasing Sdn Bhd* [1996] 1 MLJ 223, where the Court of Appeal held that a judgment that is entered for too much is a mere irregularity); and B

(g) it should be added, though it is hardly the last irregularity, and as pointed out before, a judgment entered without leave where leave is required (*Sykt Joo Seng & Anor v Habib Bank Ltd*). C

And so, should not the default judgment in the instant case, since it was entered without the court's leave, be set aside ex debito justitiae, regardless of all else? D

Gopal Sri Ram JCA in *Khor Cheng Wah v Sungai Way Leasing Sdn Bhd* [1996] 1 MLJ 223, enunciated the Court of Appeal's rejoinder (at p 229):

> It is a cardinal principle of law that when a litigant seeks the intervention of the court in a matter that affects his rights, he must do so timeously. The maxim *vigilantibus, non dormientibus, jura subveniunt*, though having its origins in the Court of Chancery, is of universal application. Even in cases where a right is exercisable ex debito justitiae, a court may refuse relief to an indolent litigant. E
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> In all cases in which delay in approaching the court is in issue, the burden is upon the litigant who has delayed to render a satisfactory explanation for it. Whether the explanation in a given case is satisfactory or reasonable depends upon the facts and circumstances of each case. F

His Lordship then quoted the following dictum of Edgar Joseph Jr FCJ in *Tuan Hj Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30 (at p 36): G

> The general rule is that when it is clearly demonstrated to the satisfaction of the court that a judgment has not been regularly obtained, the defendant is entitled to have it set aside ex debito justitiae, that is to say, irrespective of the merits and without terms. Having said that, it should be added that the application to set aside such a judgment should be made:
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> (a) with reasonable promptitude, in other words within a reasonable time; and H
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> (b) before the defendant has taken any fresh step after becoming aware of the irregularity (see O 2 r 2(i) of the Rules of the High Court 1980).

Therefore, delay — material also in *Ban Huat Seng Co Ltd v Lee Poh Soo* [1967] 1 MLJ 145, where Ismail Khan J refused to set aside a default judgment, even though it was alleged that the agreement was null and void, as the defendant had been guilty of laches and his conduct had not been bona fide — militates against the right ex debito justitiae, even I

A though: (i) it has been said that there is no rigid rule that an applicant must satisfy the court that there is a reasonable explanation for the delay (see *Fira Development Sdn Bhd v Goldwin Sdn Bhd* [1989] 1 MLJ 40); and (ii) the court in a fit case may disregard lapse of time (see *Fira Development* and *United Oriental Assurance Sdn Bhd v Ng King See* [1987] 2 MLJ 264).

B And delay, it is sadly observed, was ubiquitous in the first defendant's conduct of its defence. The appearance was filed on 9 March 1995, long after the time allowed for appearance had expired (the writ and statement of claim was served on 25 June 1994). The instant application (encl 22) to set aside the default judgment was made on 17 November 1995, that is, several months after the plaintiffs' solicitors had given notification (by C letters dated 23 May 1995 and 25 May 1995) to the first defendant and/ or Messrs Yeap & Co, the first defendant's then solicitors, of the default judgment, and several months after the plaintiffs' solicitors had served (by letters dated 15 July 1995 and 26 July 1995) a sealed copy of the default judgment on the first defendant.

D That was not all. The letters dated 23 May 1995 and 25 May 1995, apart from the service on each occasion of a sealed copy of the judgment, required the first defendant to execute the memorandum of transfer enclosed, and informed that the plaintiffs would apply to the learned senior assistant registrar for his execution if the memorandum of transfer was not executed and returned. Having failed to obtain the first defendant's E execution, the plaintiffs applied, by letter dated 14 August 1995 (encl 17) supported by an affidavit of Mr Teja (encl 16), for the learned SAR's execution of the required memorandum of transfer. On 14 September 1995, that memorandum of transfer was executed by the learned SAR.

What transpired next was disclosed in the affidavit (encl 13) of the F third plaintiff affirmed on 17 October 1995. By letters dated 23 August 1995, 2 September 1995 and 15 September 1995, the plaintiff's solicitors applied to Messrs Johari Ahmad & Tan for the documents of title ('the titles') to the subject lands. By letter dated 9 September 1995, Messrs Johari Ahmad & Tan advised the plaintiffs' solicitors to 'liaise directly with G the defendants for the said documents'. By letter dated 16 September 1995, the plaintiffs' solicitors informed the first defendant, once more, of the default judgment and requested the delivery of the titles. The titles were not delivered to the plaintiffs. That affidavit (encl 13) was filed in support of the plaintiffs' application (encl 20) for: (i) an order that the first defendant do deliver to the plaintiffs all the titles; or (ii) for an order that H the Registrar of Titles do cancel the titles and issue replacement titles; and (iii) an order that the Registrar of Titles do give effect to the default judgment dated 19 May 1995. On 25 March 1996, but in the absence of the first defendant, the plaintiffs obtained the orders sought in encl 20.

Mr Yeoh affirmed in his affidavit (encl 23) that the first defendant's I present solicitors were appointed on 19 August 1996. However, he could not obtain the cause papers from Messrs Yeap & Co. Mr Teja informed him that encl 22 was not served, but he could not, being without the cause papers, ascertain if encl 22 had been served. He took it upon himself, therefore, on 11 December 1996, to serve encl 22 on Messrs Teja Singh & Co.

As noted earlier, encl 22 was filed on 17 November 1995. Sealed copies of encl 22 were returned to Messrs Yeap & Co on 27 November 1995. When encl 22 was called up for hearing on 22 January 1996 (the return date on encl 22), the first defendant and its solicitor were absent. Hearing of encl 22 was adjourned to 25 March 1996. Meanwhile, by letter 6 February 1996, the learned SAR notified Messrs Teja Singh & Co and Yeap & Co that encl 20 would be heard on 25 March 1996 (the same date given for the hearing of encl 22). Once more, on 25 March 1996, the first defendant and its solicitor were absent. The court granted encl 20, but made no order on encl 22.

It is not unnoticed that Mr Yeoh personally conducted on 21 September 1996, a search of the court file, and would have discovered, most reasonably, that encl 22 was yet unheard and there was no date for hearing. Yet, immediate steps were not taken to prosecute encl 22; it took the first defendant another two months to apply, on 21 November 1996, for a hearing date of encl 22.

By then, the learned SAR had executed (on 14 September 1995) the memorandum of transfer and the court had ordered (on 25 March 1996) the cancellation of the titles and the issuance of replacement titles. It was not in dispute that vested interests, further to the memorandum of transfer and the issuance of replacement titles, had accrued. Undoubtedly, such accrued interests might not have been if the first defendant:

(a) had taken timeous steps to set aside the default judgment — notice of the default judgment was communicated in May 1995 but the setting aside application was made in November 1995;

(b) had been diligent in prosecuting encl 22 — the first defendant and its solicitor were absent when encl 22 was called up for hearing on 27 November 1995 and 25 March 1996 and until 21 November 1996, there was no application for a further hearing date;

(c) had resisted encl 20 — the first defendant was notified of the hearing; and

(d) had taken heed of the plaintiffs' myriad notices: (i) of the default judgment; and (ii) the intended application to court for the SAR's execution of the memorandum of transfer, the cancellation of the documents of title and the issuance of replacement titles.

Lest it is not already made clear, the measures taken by the plaintiffs to secure the execution of the memorandum of transfer and the order for the cancellation of the titles as well as the issuance of replacement titles were not accomplished *sub rosa*. Yet, the first defendant stood idly by as the default judgment was entered, as the memorandum of transfer was executed and as the order was granted to cancel and issue new titles. That was indolent conduct, and it forfeited the right ex debito justitiae to set aside the default judgment.

It would be unjust if the default judgment is set aside ex debito justitiae, as the first defendant facilitated by sheer indolence the creation of vested interests which ought not now suffer a detriment by the setting

A aside ex debito justitiae of a default judgment brought about entirely by the first defendant. It is condign only that the setting aside ex debito justitiae is refused.

There is also no defence on the merits. Firstly, there is no statement of defence. Secondly, there was not a statement in the affidavit (encl 21) B supporting encl 22 that resembled, even remotely, a defence, let alone a prima facie defence. All that was said in encl 21 was that the default judgment was irregular.

In encl 34A, an affidavit supporting the first defendant's application (since withdrawn) to stay the order of 25 March 1996, the second defendant C deposed to the damages that would be sustained by the first defendant — the deposit of RM250,000, the expenses of RM403,268 and the years devoted to the project — if the order of 25 March 1996 was not stayed. The second defendant complained that the plaintiffs, aside from the forfeiture of the deposit, would also be unfairly taking the benefit of the work invested by the first defendant onto the said lands.

D In a further affidavit (encl 35), much of which content was similarly deposed in encl 33, the second defendant deposed to the defendants' endeavours 'untuk menyelesaikan perkara ini sebelum ... plaintif ... melantik Teja Singh', and the circumstances under which the defendants had appointed solicitors to defend their cause. In para 22, the second defendant E exhibited a supplementary agreement signed between the parties. He asserted that that supplementary agreement varied the agreement of 17 November 1987, in that the balance sum was agreed to be satisfied by the first defendant's transfer of a number of houses — to be erected on the subdivided lots and to be completed by or before 17 November 1990, a dateline extendible for another year. The second defendant contended: F (i) that that supplementary agreement was void as there was a total failure of consideration; (ii) that the agreement of 17 November 1987, by reason of the provisions of cl 5, was a contingent contract; and (iii) that the action was premature as the agreement of 17 November 1987 was not terminated. He claimed that the first defendant had not breached the agreement as the G first defendant had proper time 'to do his part of the bargain' and the first defendant had done its best.

In encl 43, Mr Yeoh forwarded the first defendant's proposed defence and counterclaim, and the proposed defence may be summarized, the material parts, as follows: (i) pursuant to the agreement on 17 November 1987, the first defendant paid a deposit of RM250,000 and the said lands H were transferred to the first defendant; (ii) to convert the said lands into a housing scheme, and to obtain local approval for the said development, the said lands were converted into 152 building lots; (iii) a denial of all knowledge that the second, third and fourth defendants had guaranteed the payment of the balance sum; (iv) a denial that the first defendant had I not paid the balance sum; (v) a denial of the plaintiffs' demand for the payment of the balance; (vi) the agreement was conditional upon Multi-Purpose Co-operative Society Bhd executing a transfer of the said lands to the first defendant, and that condition was waived by a direct transfer of the said lands from Multi-Purpose to the first defendant; (vii) time was not

of essence, and the plaintiffs by their conduct had acquiesced to the first defendant taking reasonable time to obtain formal approval for the development of the said lands into a housing scheme and to obtain approval for bridging and end financing; and (viii) the plaintiffs had breached the said agreement by filing the action without a notice of termination.

In *Fira Development Sdn Bhd v Goldwin Sdn Bhd*, the Supreme Court, per Lee Hun Hoe CJ (Borneo), articulated that 'a defence on the merits means merely raising only an arguable or triable issue'.

Rubin JC, in *Hong Leong Finance Ltd v Tay Keow Neo & Anor* [1992] 1 SLR 205, citing *Alpine Bulk Transport Co Inc v Saudi Eagle Shipping Co Inc; the Saudi Eagle* [1986] 2 Lloyd's Rep 221, held that a defence has merits if there is a reasonable prospect of success on the grounds stated and evidence placed before the court.

From the affidavits before the court, there is no doubt whatsoever that the balance sum was not paid to the plaintiffs. There is also no doubt that the first defendant had the lands that the plaintiffs contracted to sell to the first defendant. Now, albeit that that agreement of 17 November 1987 did not provide for the payment of the balance, it was an implied term, reasonable as well as equitable (see *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1978) 52 AJLR 20) and necessary to give business efficacy to the agreement (see *Reigate v Union Manufacturing Co (Ramsbottom)* [1918] 1 KB 592) that the balance sum would be paid. The basic agreement was an exchange, of land for money, and money for land. The conditions in cl 5 of the agreement of 17 November 1987 merely provided that the lands purchased: (i) could be transferred to the first defendant (and they were transferred free of all encumbrances); (ii) would be vacant and 'grant first grade' (there was no allegation that they were not so); (iii) could be developed into a housing scheme (and they could be, since the said lands were subdivided into separate building lots); (iv) could secure development loans (there was no allegation to the contrary); and (v) would be transferred from Multi-Purpose to the first defendant (done).

Clause 6 which provided:

> if any of the conditions in cl 5 shall be refused, then this agreement shall an end terminates (sic) and be void and neither party shall have any further rights hereunder and the vendor shall immediately refund all monies paid by the purchaser ... ,

and cl 7 which provided:

> upon obtaining the approval from the relevant authorities for development of the said (lands) into a housing scheme, and upon grant of letters of administration in respect of the estate of Ng Gaik Cheng, the vendor shall transfer the said (lands) free of all encumbrances to the purchasers,

under the circumstances — where none of the conditions in cl 5 had not been unfulfilled and where the said lands were transferred free of all encumbrances to the first defendant, had been overtaken by events, effete as such, and given the undoubted facts — had no application whatsoever.

With regard to encl 34, and the second defendant was merely bemoaning the first defendant's misfortune — the damages that it would

A sustain (the loss of the deposit of RM250,000 and the expenses of RM403,268 and the years devoted to the project) and that the plaintiffs would take the benefit of the work the first defendant had invested into the said lands — it was a suppliant's lament on the consequences ensuing from the first defendant's loss of the said lands, all self-created; but it was not a reasonable defence for the failure to pay the balance sum demanded.

B With regard to encl 35, include encl 33:

(a) the trials and tribulations that the first defendant had undergone and was undergoing as a developer were not the concern of the plaintiffs;

(b) the assertion that the supplementary agreement was void, even if C sustained, would not help the first defendant's cause, as the plaintiffs relied solely on the agreement of 17 November 1987;

(c) the assertion that the agreement of 17 November 1987, by reason of the provisions of cl 5, was a contingent contract, was divorced from the undoubted facts, as the conditions in cl 5 were not unfulfilled;

D (d) the assertion, that the action was premature, as the agreement of 17 November 1987 was not priorly terminated and that the first defendant had proper time 'to do his part of the bargain', was inconsequential, as the plaintiffs, having performed their part of the agreement, were entitled to demand and to sue upon the first defendant's default for the balance sum.

E As for the proposed defence and counterclaim, the denial of knowledge that the second, third and fourth defendants had guaranteed the first defendant's payment of the balance sum, the denial that the first defendant had not paid the balance sum or that the plaintiffs had demanded the balance sum, and those denials were against the facts, were duplicitous F and spoke little of the veracity and bona fides of the proposed defence. The assertion that time was not of essence is a bare allegation, while the assertion that the plaintiff acquiesced to the first defendant taking reasonable time to obtain formal approval for the development of the said lands into a housing scheme and to obtain approval for bridging and end financing, was G entirely unreasonable as the first defendant, what with an agreement signed in 1987, the subdivided titles issued to it in March 1991, the demand for payment in March 1993 and the action filed in January 1994, had exhausted all reasonable time to pay the balance sum. It is not arguable, on a reasonable basis, that the plaintiff should be made to wait any more.

H As the rest of the proposed defence have been dealt, as the proposed counterclaim — a claim on the refund of the deposit and the development expenses — does not amount to a defence to the plaintiffs's claim, as there was no allegation that the plaintiffs' demand had not given reasonable time to the first defendant to pay the balance, and for the reasons given herein, the application to set aside the default judgment is hereby dismissed with costs.

I *Application dismissed.*

Reported by Jafisah Jaafar